A

LIM CHEANG HOCK & ANOR

v.

TNEH POAY LAN

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ZALEHA ZAHARI JCA
HELILIAH MOHD YUSOF JCA
[CIVIL APPEAL NO: P-02-1049-2001]

C

12 SEPTEMBER 2006

LANDLORD AND TENANT: *Agreement - Construction - Relationship between parties - Whether one of licensor and licensee or one of landlord and tenant - Exclusive possession of subject property - Tenancy by estoppel*

D

- Breach of covenant against subletting

CONTRACT: *Construction - Landlord and tenant - Relationship between parties - Whether one of licensor and licensee or one of landlord and tenant - Exclusive possession of subject property - Tenancy by estoppel*

E

- Breach of covenant against subletting

This was an appeal by the defendants against the order of the High Court granting the following declarations sought by the plaintiff: (i) that the plaintiff was the tenant of the certain premises owned by the first defendant ('said premises'), *inter alia*, pursuant

F

to s. 6 of the Control of Rent (Repeal) Act 1997 ('Act'); and (ii) that the second defendant was the licensee of the plaintiff pursuant to an agreement dated 1 November 1995 ('said agreement') and was entitled to temporary possession of the said premises until 2 August 1998. The first defendant was the landlord

G

of the said premises of which the plaintiff was the tenant; the tenancy agreement between the plaintiff and his landlord prevented a subletting of the said premises. On 1 November 1995, the plaintiff entered into an agreement with the second defendant, and the second defendant later sublet the said premises to his

H

brother, the third defendant. The plaintiff then took out a summons seeking the aforementioned declarations. The learned judge found for the plaintiff and granted the declarations sought. The main issue both in the court below and before this court was whether the second and third defendants were licensees of the

I

plaintiff. The second defendant's case was that upon a proper construction of the said agreement, he was at all material times the plaintiff's subtenant and not a mere licensee. The plaintiff,

however, argued that if the said agreement was read in the light of the surrounding circumstances, the true relationship between the parties was one of licensor and licensee and not one of landlord and tenant.

Held (allowing the appeal)
Per Gopal Sri Ram JCA:

(1) It appears to be settled by the authorities that whether a particular relationship was that of licensee or tenant depends upon whether the person in occupation had exclusive possession of the subject property. It was plain on a reading of the said agreement as a whole that the second defendant had exclusive possession of the said premises. For example, cl. 4 ensured quiet possession in the second defendant's favour, which pointed strongly to the relationship between the parties being one of landlord and tenant rather than licensor and licensee. Applying the approach commended by the cases of *Kandasami v. Mohamed Mustafa* and *Goh Gok Hoon v. Abdul Hamid*, it was patently clear that the plaintiff in the present instance was not merely creating a licence in the second defendant's favour. Of course, the second defendant was permitted to run the coffee shop that was situated at the said premises but, for the reasons already given, what was being conveyed to the second defendant was exclusive possession of the said premises. (paras 9, 11 & 15)

(2) The plaintiff's submission that the second defendant could not be more than a mere licensee because the subtenancy, if any, in the second defendant's favour was created in breach of the covenant against subletting contained in the agreement between him and the first defendant landlord, must be rejected (*Methani v. Perinayagam* foll). In *Methani (supra)*, which dealt with the same argument, it was held that where the facts justify the creation of a tenancy by estoppel, it follows that the relationship of landlord and tenant is created between the parties to the estoppel. In such cases, the doctrine of tenancy by estoppel does apply and the law is that in such a case the grantor, notwithstanding he had no estate or interest in the land, is estopped by intendment of law from denying that he had created a tenancy. (paras 16, 18, 19 & 20)

(3) The plaintiff's second submission was that he should succeed against the third defendant because of the second defendant's breach of covenant against subletting. The point made was that since the second defendant had breached the covenant against subletting and put the third defendant, his brother, in possession of the said premises, his brother was a mere licensee. However, since the plaintiff, on the evidence, had knowledge of the third defendant's presence on and occupation of the said premises and had received rent from him, it no longer lay in his mouth to assert a breach of the covenant against subletting (*Yap Choo Neo (W) v. Cheng Lan Lim* foll). (paras 21, 22 & 23)

Bahasa Malaysia *translation of headnotes*

Ini adalah rayuan defendan-defendan terhadap perintah Mahkamah Tinggi kerana membenarkan deklarasi-deklarasi berikut kepada plaintif: (i) bahawa plaintif adalah penyewa kepada sebuah premis yang dimiliki oleh defendan pertama ('premis tersebut') di bawah, antara lain, s. 6 Akta Kawalan Sewa (di Mansuh) 1997 ('Akta'); dan (ii) bahawa defendan kedua adalah pemegang lesen plaintif ekoran satu perjanjian bertarikh 1 November 1995 ('perjanjian tersebut') dan berhak kepada milikan sementara premis tersebut sehingga 2 Ogos 1998. Defendan pertama adalah tuantanah kepada premis tersebut di mana plaintif adalah penyewanya; perjanjian tenansi antara plaintif dan tuantanah melarang plaintif dari menyewa semula premis tersebut. Pada 1 November 1995, plaintif memeterai perjanjian dengan defendan kedua, dan defendan kedua kemudian menyewakan premis tersebut kepada saudaranya, defendan ketiga. Maka plaintif memulakan saman memohon deklarasi-deklarasi di atas. Yang arif hakim memihak kepada plaintif sekaligus membenarkan deklarasi yang dipohon. Isu penting yang berbangkit di hadapan mahkamah di bawah dan mahkamah semasa adalah sama ada defendan kedua dan ketiga merupakan pemegang lesen plaintif. Kes defendan kedua adalah bahawa, atas pentafsiran wajar perjanjian, beliau adalah pada semua masa material seorang penyewa kecil plaintif, dan bukan semata-mata seorang pemegang lesen. Plaintif, bagaimanapun, berhujah bahawa jika perjanjian tersebut dibaca dalam konteks keadaan sekeliling yang wujud, hubungan sebenar pihak-pihak adalah sebagai pemberi lesen dan pemegang lesen, dan bukannya sebagai tuantanah dan penyewa.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR:

(1) Autoriti-autoriti nampaknya telah memutuskan bahawa sama ada sesuatu hubungan itu hubungan pemegang lesen atau penyewa akan bergantung kepada sama ada orang yang menghuni itu mempunyai milikan ekslusif hartanah. Adalah jelas dari pembacaan perjanjian tersebut secara menyeluruh bahawa defendan kedua mempunyai milikan ekslusif premis tersebut. Contohnya, perenggan 4 menjamin milikan aman untuk manfaat defendan kedua, sekaligus menunjukkan dengan jelas bahawa hubungan di antara pihak-pihak adalah hubungan tuantanah dan penyewa dan bukannya antara pemberi lesen dan pemegang lesen. Menggunapakai pendekatan yang dianjurkan oleh kes-kes *Kandasami v. Mohamed Mustafa* dan *Goh Gok Hoon v. Abdul Hamid*, amatlah jelas bahawa plaintif di sini bukan semata-mata memberikan lesen kepada defendan kedua. Memanglah defendan kedua dibenar menjalankan perniagaan kedai kopi yang terletak di premis tersebut, tetapi, seperti yang dijelaskan, apa yang sebenarnya diberi kepada defendan kedua adalah milikan ekslusif premis tersebut.

(2) Hujah plaintif bahawa kedudukan defendan kedua tidak lebih dari seorang pemegang lesen disebabkan tenansi kecil untuk manfaat defendan kedua, jikapun wujud, telah dimeterai secara yang melanggar peruntukan kovenan di antara beliau dengan defendan pertama/tuantanah yang melarang penyewaan kecil, harus ditolak (*Methani v. Perinayagam* diikuti). Dalam *Methani (supra)*, yang berdepan dengan hujah yang sama, telah diputuskan bahawa, di mana fakta menjustifikasikan pembentukan tenansi melalui estopel, ianya mengikut bahawa hubungan tuantanah dan penyewa telah terbentuk di antara pihak-pihak kepada estopel. Dalam kes-kes sedemikian, doktrin tenansi melalui estopel adalah terpakai dan undang-undangnya adalah, pemberi, walaupun tidak mempunyai estet atau kepentingan di dalam tanah, diestop oleh undang-undang dari menyangkal bahawa suatu tenansi telahpun dibentuk olehnya.

(3) Hujah kedua plaintif adalah bahawa beliau harus berjaya terhadap defendan ketiga disebabkan defendan kedua telah melanggar larangan kovenan terhadap penyewaan kecil. Inti hujahnya adalah, oleh kerana defendan kedua telah melanggar larangan kovenan terhadap penyewaan kecil, dan telah

memberikan defendan ketiga, saudara lelakinya, milikan premis tersebut, saudaranya itu hanyalah seorang pemegang lesen sahaja. Apapun, oleh kerana keterangan menunjukkan bahawa plaintif mengetahui tentang kehadiran atau penghunian defendan ketiga di premis tersebut, dan telah menerima sewa darinya, maka adalah tidak terbuka baginya untuk membangktikan soal pelanggaran larangan kovenan terhadap penyewaan kecil (*Yap Choo Neo (W) v. Cheng Lan Lim* diikuti).

Case(s) referred to:

Addiscombe Garden Estate Ltd. v. Crabbe [1958] 1 QBD 513 ***(refd)***
Antoniades v. Villiers [1988] 3 All ER 1058 ***(refd)***
Goh Gok Hoon v. Abdul Hamid [1967] 1 MLJ 36 ***(foll)***
Hock Yew Co v. Fraser & Neave (M) Ltd & Ors [1965] 2 MLJ 248 ***(not foll)***
Kandasami v. Mohamed Mustafa [1983] 2 CLJ 55; [1983] CLJ (Rep) 7 PC ***(foll)***
Methani v. Perinayagam [1961] 27 MLJ 5 ***(foll)***
Pong Khee Kwei v. Tan Sai Kuy [1972] 2 MLJ 48 ***(refd)***
Street v. Mountford [1985] 2 All ER 289 ***(refd)***
Yap Choo Neo (W) v. Cheng Lan Lim [1952] 18 MLJ 160 ***(foll)***

Legislation referred to:

Control of Rent (Repeal) Act 1997, ss. 3, 6(1)

For the appellants - Lee Khai; M/s Ong & Manecksha
For the respondent - Sunny Khoo; M/s Ismail Khoo & Assoc

[Appeal from High Court, Pulau Pinang; Originating Summons No: 24-455-1998]

Reported by Suresh Nathan

JUDGMENT

(Oral)

Gopal Sri Ram JCA (delivering judgment):

[1] This is the judgment of the court.

[2] This appeal is directed against the order of the High Court dated 24 October 2001. By that order the High Court granted the declarations sought by the plaintiff (respondent before us). Those declarations were in the following terms:

1. That the plaintiff is the tenant of premises no. 150 & 152, Jalan Macalister, Pulau Pinang owned by the first defendant, *inter alia*, pursuant to section 6, Control of Rent (Repeal) Act 1997;

2. That the second defendant is the licensee of the plaintiff pursuant to an agreement dated 1 November 1995 and is entitled to temporary possession of no. 150 & 152, Jalan Macalister, Pulau Pinang latest until 2 August 1998.

[3] The factual matrix against which these declarations were granted is as follows. Choong Lye Hock Estate Sdn. Bhd. (the first defendant in the court below but who is not before us) is the landlord of certain premises of which the plaintiff is the tenant. The tenancy agreement between the plaintiff and his landlord prevents a subletting of the premises in question. On 1 November 1995 the plaintiff entered into an agreement with the second defendant (second appellant before us). It is an important document. In fact everything turns upon it. It is therefore necessary to set it out *in extenso*. This is what it states:

This Agreement is made the 1st day of November 1995 between TNEH POAY LAN (NRIC NO. 1837486) of No. 150, Macalister Road, Penang (hereinafter referred to as "the Lessor") of the one part AND LIM CHEANG HOCK (NRIC NO. 4269223) of No. MKV 59, Kuala Sg. Pinang, Balik Pulau, Penang (hereinafter referred to as 'the Lessee') of the other part.

WHEREAS the Lessor is the registered proprietor of the coffee shop business known as CHOP YEE LOO of No. 150-152, Macalister Road, Penang (hereinafter referred to as 'the said Business').

WHEREAS the Lessor is carrying on the said business on the ground Floor of No. 150-152, Macalister Road, Penang (hereinafter called 'the said Premises').

AND WHEREAS the Lessor agrees to let and the Lessee agrees to take the said business at the said premises upon the terms and conditions hereinafter appearing.

WHEREBY IT IS AGREED as follows:

1. The Lessor shall hereby let and the Lessee shall hereby take over the said business of the said CHOP YEE LOO of No. 150-152, Macalister Road, Penang and deemed to have commenced for the term as from 3rd day of August, 1995 to the 2nd day of August, 1998 (hereinafter referred to as

"the said Lease") PAYING THEREFORE a rental of Ringgit Malaysia Three Thousand Six Hundred Only (RM3,600-00) per month which is payable within the first two weeks of each calendar month.

2. The Lessee shall on the execution of this Agreement pay to the Lessor the sum of Ringgit Malaysia Twenty Five Thousand Only (RM25,000-00) being deposit of rent (hereinafter referred to as "the said Deposit") in respect of the said business at the said premises (the receipt of which the Lessor hereby acknowledges) which shall be refunded to the Lessee upon the completion of the said lease and upon all the terms and conditions hereinafter contained being fulfilled and/or observed.

3. The Lessee hereby covenants with the Lessor as follows:

(a) To pay the said rental within the first week of each month without any deduction whatsoever, failing which, the Lessor will be at his absolute discretion to forfeit the said deposit and no action shall be brought by the Lessee in respect thereof and this Agreement shall be null and void Ipso Facto.

(b) to observe and comply with all laws, bye-laws and regulations affecting the said business and premises which are now in force or which may hereinafter be enacted.

(c) to pay all charges in respect of water, electricity and conservancy in respect of premises No. 150, Macalister Road, Penang only and deliver a copy of the receipts for the same to the Lessor.

(d) Not to make or permit anyone to make any alteration in the construction or arrangement of the said premises without the consent of the Lessor in writing.

(e) To permit the Lessor or his agents at all reasonable time during the term of the lease to enter upon and examine the condition of the said premises together with the fixtures and fittings thereto and thereupon the Lessor may serve upon the Lessee notice in writing specifying any repair necessary to be done and require the Lessee to forthwith execute the same and if the Lessee do not within ten (10) days after the receipt of such notice commence and proceed diligently with the execution of such repairs then to permit the Lessor to enter upon the

said premises and execute such repairs and the costs thereof shall be a debt due from the Lessor and be forthwith recoverable by legal action.

(f) To white-wash the said premises to the satisfaction of the relevant authorities once a year.

(g) All costs for repairs of the said premises amounting to or below Ringgit Malaysia One Thousand Five Hundred Only (RM1,500-00) shall be solely borne by the Lessee and if it is above RM1,500-00 then it shall be equally borne by the Lessor and the Lessee.

(h) Not to do or suffer to be done on the said premises anything whereby the licence of the said business may be rendered void or voidable.

(i) Not to sell or allow to sell the same kind of food which is now carrying on at the said premises without the consent of the Lessor.

(j) Not to assign sublet or part with the said business and/or premises without the written consent of the Lessor.

(k) Not to remove or sell any of the fixtures and fittings in the said premises.

(l) To be liable at all times for all fines, penalties and consequences in respect of any illegal acts done in the said premises and at all times during the continuance of the lease indemnify and keep indemnified the Lessor his personal representatives estate and effects against all liabilities which the Lessor may incur by reason of the Lessee's breach of any of the covenants herein contained.

(m) to pay all lawyer's fees, legal costs, charges, disbursements and payments in connection with any claim or action against the Lessor arising from the acts or omission on the part of the Lessee of the covenants of this Agreement with the Lessor.

(n) Time shall be of essence of this Agreement whenever mentioned.

(o) At the determination of the said term to deliver up to the Lessor the said business and the said premises and all fixtures and additions thereto in such repair as shall in accordance with the covenants by the Lessee hereinbefore contained.

4. The Lessor hereby covenants with the Lessee as follows:

(a) That the Lessee on paying the rent and on performing the Agreement therein contained may quietly possess and enjoy the said premises with the fixtures and fittings thereto and the said business during the term of the lease without any interference from the Lessor or those claiming under him.

(b) In case of non payment of rent whether the same has been first demanded formally or not or breach of the Agreement by the Lessee the Lessor shall be at liberty to re-enter and take possession of the said premises and the business therein without prejudice to any other rights or remedies of the Lessor and thereupon this letting shall determine Ipso Facto and absolutely and the deposit paid under the Clause 2 hereof shall be forfeited.

5. In the event of the Lessee desiring or insisting to terminate this Agreement before the term of the said lease the said deposit of RM25,000-00 shall be forfeited to the Lessor as agreed liquidated damages but without prejudiced to the rights of the Lessor or to recover any arrears or rent then due or damage for any breach of the Lessee's covenants and stipulations.

6. Notwithstanding anything herein contained it is expressly agreed that in the event of the said premises being destroyed or damage by fire by an Act of God at any time during the period of the said lease so as to become unfit for business and use then the deposit of RM25,000-00 paid under Clause 2 hereof shall be refunded to the Lessee and thereupon the said lease shall determine Ipso Facto and absolutely.

7. Any notice under this Agreement shall be deemed to be sufficiently served on the Lessee if left addressed to him on the said premises or sent by registered post or left at his last known address and in the case of the Lessor the same shall be deemed to be sufficiently served if sent to him by registered post or delivered personally to him at the address hereinbefore mentioned.

8. This Agreement shall bind the heirs personal representatives and assigns of the Lessor and Lessee respectively.

9. The Lessee shall have the option to renew the lease for another one (1) year term by paying the monthly rental of RM3,700-00 and upon expiry of the second lease term, the Lessee shall have another option to renew the lease for another one (1) year term by paying the monthly rental of RM3,800-00.

In witness whereof the parties hereto have hereunto set their hands the day and year first above written.

[4] Later, the second defendant sublet the premises in question to his brother, the third defendant. We must mention at once that at the material time the premises in question were subject to the provisions of the Control of Rent Act 1966. In 1997 parliament passed the Control of Rent (Repeal) Act 1997 which came into force on 1 September 1997. Section 3 of that Act provides as follows:

3. Upon the repeal of the Act under section 2, any tenancy between a landlord and a tenant before the date of the repeal shall forthwith be deemed to have ceased.

[5] Section 6(1) of the Act provided as follows:

6.(1) Notwithstanding section 3, any tenant, sub-tenant or joint-tenant who:

(a) was in actual occupation of the premises on the date of the repeal of the Act; and

(b) could have lawfully continued to occupy the premise but for the repeal of the Act,

shall be deemed to have entered into a tenancy with the landlord as from the date of the repeal of the Act.

[6] On 21 May 1998 the plaintiff took out a summons seeking the declarations averted to earlier in this judgment. These declarations are important to the plaintiff because if he is right then he would be the only person who will obtain the benefit of s. 6(1) of the Act. If, of course, he was not the person in occupation then s. 6(1) would not apply to him. That appears to be undisputed.

[7] The learned judge who heard the originating summons found for the plaintiff. He granted the declarations sought.

[8] The main issue both in the court below and before us is whether the second and third defendants were licensees of the plaintiff. The second defendant's case is that upon the proper construction of the agreement dated 1 November 1995 he is and was at all material time the plaintiff's sub-tenant and not a mere licensee. Mr. Khoo for the plaintiff has argued that if one looks at the agreement and reads it in the light of the surrounding circumstances the true relationship between the parties is one of licensor and licensee and not one of landlord and tenant.

[9] It appears to be settled by the authorities that whether a particular relationship is that of licensee or tenant depends upon whether the person in occupation had exclusive possession of the subject property. See *Pong Khee Kwei v. Tan Sai Kuy* [1972] 2 MLJ 48 where Sharma J discussed all the relevant authorities on point. In *Addiscombe Garden Estate Ltd. v. Crabbe* [1958] 1 QBD 513 at p 522 Jenkins LJ said this:

> The whole of the document must be looked at; and if, after it has been examined, the right conclusion appears to be that, whatever label may have been attached to it, it in fact conferred and imposed on the grantee in substance the rights and obligations of a tenant, and on the grantor in substance the rights and obligations of a landlord, then it must be given the appropriate effect, that is to say, it must be treated as a tenancy agreement as distinct from a mere a licence.

[10] *Street v. Mountford* [1985] 2 All ER 289 and *Antoniades v. Villiers* [1988] 3 All ER 1058 were cases where the landlord asserted that the persons there in occupation were licensees. The House of Lords in both cases held the occupiers to be tenants. Lord Templeman made it clear that it is effect of the particular agreement – whether it creates a licence or a tenancy – that is of paramount consideration for the court. The learned Law Lord said:

> In the present case, the agreement dated 7 March 1983 professed an intention by both parties to create a licence and their belief that they had in fact created a licence. It was submitted on behalf of Mr. Street that the court cannot in these circumstances decide that the agreement created a tenancy without interfering with the freedom of contract enjoyed by both parties. My Lords, Mr. Street enjoyed freedom to offer Mrs. Mountford the right to occupy the rooms comprised in the agreement on such lawful terms as Mr. Street pleased. Mrs. Mountford enjoyed freedom to

> negotiate with Mr. Street to obtain different terms. Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for actual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.

[11] Let us now look at the document in this case. Without reproducing the essential clauses it is plain on reading of the agreement of 1 November 1995 as a whole that the second defendant had exclusive possession of the premises in question. For example, cl. 4 ensures quiet possession in the second defendant's favour. This points strongly to the relationship between the parties being one of landlord and tenant rather than licensor and licensee.

[12] In *Kandasami v. Mohamed Mustafa* [1983] 2 CLJ 55; [1983] CLJ (Rep) 7, the facts of which case in our opinion are indistinguishable from the present one, Lord Brightman when delivering the advice of the Privy Council viewed the agreement in that case to be one that created the relationship of landlord and tenant rather than that of licensor and licensee. In particular, the Privy Council expressly upheld the following findings of the trial judge:

> Even if the various clauses of the document were to be considered, it would be seen that the majority therein are covenants such as those for quiet enjoyment and reentry, which are normally found in standard tenancy agreements. In my opinion, therefore, the true relationship between the parties as revealed by their conduct and the surrounding circumstances was that of the landlord and a tenant and not that of a licensor and licensee.

[13] Lord Brightman then went on to say as follows:

> The Federal Court considered that 'the dominant intention of the parties' was 'to give a licence to run the (defendant's) business of an eating shop as the (plaintiff's) own for the term with

A necessarily the use of the ground floor for this purpose. Clause 5 becomes decisive of the special relationship between the parties and the habendum must be seen to be an error of drafting.' In their Lordships' view it is the habendum and not clause 5 which is decisive. Except for clause 5, every recital and every clause of
B the July Document is either inconsistent with the grant of a licence or is neutral. Clause 5 is out of step with the rest of the document. It seeks to attach a label of 'licence' to a document which plainly is not a licence. It fails in that objective. The label does not attach.

C **[14]** In *Goh Gok Hoon v. Abdul Hamid* [1967] 1 MLJ 36, the plaintiff landlord, on facts not dissimilar from the present, asserted, as was done in the present instance, that the occupant in that case was only a lessee of the business and not of the premises. That contention was rejected by Ismail Khan J who, after setting
D out the agreement in that case, went on to say as follows:

> In D2 the recital, referring to 'the restaurant business at No. 2, Wolferstan Road', coupled the business together with the premises. Clause 6 then stipulated that 'the lessee shall not sublet the premises'; hence it raises the question, 'if he was not a sub-
> E tenant, having an interest as such in the premises, why prohibit him from doing what was beyond his powers?' Clause 9 imposed on the lessee an obligation to pay the rent of the premises to the landlord, and clause 17 enabled the lessor 'to take possession of the premises' for non-payment of rent. This necessarily implied
> F that the lessee was entitled to undisturbed possession of the premises, to the exclusion of the lessor, so long as rent continued to be paid. Exclusive possession, especially in the circumstances of this case, was not merely a hall-mark of a tenancy, but it was also in my opinion clear proof that the person having such possession was legally a tenant and not a licensee – see *Errington*
> G *v. Errington* [1952] 1 All ER 155; *Addiscombe Garden Estates Ltd. v. Crabbe* [1957] 3 All ER 563.

The judgment of Ismail Khan J (later CJ Borneo) was upheld by the Federal Court. See [1968] 2 MLJ 3.

H **[15]** Applying the approach commended by the cases already cited, it is patently clear that the plaintiff in the present instance was not merely creating a licence in the second defendant's favour. Of course, the second defendant was permitted to run the coffee shop which was situated at the premises in question. But,
I for the reasons we have already given, what was being conveyed to the second defendant was exclusive possession of the premises in question.

[16] It is now necessary for us to deal with two other arguments advanced by Mr. Khoo in answering to this appeal. First, he submits that the second defendant could not be more than a mere licensee because the sub tenancy, if any, in the second defendant's favour was created in breach of the covenant against subletting contained in the agreement between him and the first defendant landlord. In support of this submission Mr. Khoo relies on a passage in RR Sethu's *"Rent Control Legislation In Malaysia"*. That passage is at p. 30 of the work. It reads:

> It appears that if the chief tenant was prohibited by the terms of the tenancy from subletting and if the landlord had not waived a breach thereof by the chief tenant, the latter cannot sublet and if he purports to do so to another, the relationship thus created between the chief tenant and the other is that of a licensor and licensee only. This view follows from the decision of the Court of Appeal in *Great Eastern Life Assurance v. Goh Ah Kow* [1981] 1 MLJ 127. The principle underlying this approach seems to be that a person cannot grant what he has not got (the nemo dat rule).
>
> The nemo dat rule was applied in effect in *Hock Yew Co v. Fraser & Neave (M) Ltd & Ors* [1965] 2 MLJ 248.

[17] In *Hock Yew*, this is what Gill J said:

> It follows from what I have said that the second defendants as mere licensees had no power to grant a subtenancy to the plaintiffs. Consequently the relationship between the second defendant and the plaintiffs was that of sub-licensor and sub-licensee.

[18] However, in *Methani v. Perinayagam* [1961] 27 MLJ 5 Wee Chong Jin J dealt with the same argument now raised before us. And this is what he said:

> Counsel for the plaintiff contends that the relationship of landlord and tenant is purely an English common law notion and I entirely agree that this is so. It would therefore appear at first sight that the plaintiff, being only a licensee of the land on which these premises stand, had no estate or interest in the land out of which to carve a tenancy. Upon this principle of the common law has however been grafted an exception, namely, the doctrine of tenancy by estoppel. The doctrine is that a tenant may not question his landlord's title and, conversely, that a landlord having by his offer of a tenancy induced a tenant to enter into (or

A remain in) occupation and to pay rent, cannot deny the validity of the tenancy by alleging his own want of title to create it (see Harman J delivering the judgment of the Court of Appeal in *E.H. Lewis & Son Ltd. v. Morelli* [1948] 2 All ER 1023 at p. 1024). In my view, where the facts justify the creation of a tenancy by estoppel it follows that the relationship of landlord and tenant is created between the parties to the estoppel. Support for this view may I think be found in the observations contained in the same judgment delivered by Harman J which I have just cited.

B

[19] In a later passage the learned Chief Justice of Singapore said C this:

The other contention advanced on behalf of the plaintiff is that, assuming the defendant was not precluded from relying on the doctrine of tenancy by estoppel, he cannot be estopped from saying that he could not by law create a tenancy. I understand D counsel's argument to be that the doctrine of tenancy by estoppel cannot apply to a case such as this where the grantor had himself no estate or interest in the land and so could not in law create a tenancy but in my opinion the short answer to it is that in such a case the doctrine does apply and that the law is that in such a E case the grantor notwithstanding he had no estate or interest in the land is estopped by intendment of law from denying that he had created a tenancy.

[20] It is to be noted that the views of Wee Chong Jin J were not made available to nor discussed by Gill J in *Hock Yew*. If they F had been, it is entirely unlikely, that *Hock Yew* would have been decided in the way it was. For ourselves, we respectfully prefer the judgment of Wee Chong Jin J in *Methani*, and for the reasons set out therein, we would reject, very respectfully the first submission advanced on the plaintiff's behalf.

G

[21] We turn now to the second submission. It is Mr. Khoo's argument that his client should succeed against the third defendant because of the second defendant's breach of the covenant against subletting. The point made here is this. Since the H second defendant had breached the covenant against subletting and put his brother, the third defendant in possession of the premises, the third defendant was a mere licensee. Mr. Lee for the defendants has however drawn our attention to the undisputed evidence in the appeal record which demonstrates two matters: I First that the plaintiff had knowledge of the subletting; second that he had received rent from the third defendant.

[22] In *Yap Choo Neo (W) v. Cheng Lan Lim* [1952] 18 MLJ 160 a rest house had been let out. The tenant sub-let the premises. The landlord sought vacant possession against the subtenant which was a partnership. She failed. Knight J when delivering judgment said this:

> The plaintiff normally garaged her car on the Resthouse premises, she is clearly a woman of intelligence and business acumen and quite apart from whether, on the principle of agency, she should be fixed with her son-in-law's knowledge, I have no doubt that she knew full well of the existence of the partnership and was quite happy to receive rent from it. It is not insignificant in this regard that as long ago as 12th August 1949 she seemingly instructed her then solicitors to inform 'The Manager' of the Resthouse as to a change in the method of paying rent, (page 20 of Exhibit I).
>
> I find, therefore, that the plaintiff both before and after 25th May 1950-the date of the current lease when these proceedings were instituted - knew full well that the partnership was managing the Resthouse and that her son-in-law - by written agreement of which she must have had knowledge - was one of the partners. In these circumstances, and assuming that the partnership was in fact an unauthorized sub-tenant, thus breaching the defendant's covenant, the plaintiff clearly waived this breach by accepting rent from the partnership - *Walrond v. Hawkins* [1874] LR 10 CPC 342. On this finding it is unnecessary for me to consider whether in law the defendant did or did not sub-let his tenancy to the partnership in breach of his covenant - because if he did not, there was certainly no breach.

[23] So too here. Since the plaintiff on the evidence, had knowledge of the third defendant's presence on the premises and of his occupation and received rentals from him, it now no longer lies in his mouth to assert a breach of the covenant against sub-letting.

[24] For the reasons already given, we are of the view that the appeal must succeed. It is allowed. The orders of the learned judge in the court below are set aside. The originating summons dated 21 May 1998 is hereby dismissed. The defendants will have their costs in this court and in the court below. The deposit lodged in court shall be refunded to the defendants.